Filed 2/11/19 In re P.S. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re P.S., a Person Coming Under the Juvenile Court Law.	B286976 (Los Angeles County Super. Ct. No. CK77145)
P.S., a Minor, Objector and Appellant v. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff; JESSE G. et al., Real Parties in Interest and Respondents.	

APPEAL from an order of the Superior Court of Los Angeles County, Veronica S. McBeth, Judge. (Retired judge of the L.A. Sup. Ct assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed.

Cristina Gabrielidis, under appointment by the Court of Appeal, for Objector and Appellant.

No appearance for Plaintiff.

Pamela Rae Tripp for Real Parties in Interest and Respondents.

In this appeal, P.S. argues that the juvenile court erred when it failed to apply the relative placement preference pursuant to Welfare and Institutions Code section 361.3[1] when evaluating her grandparents' request for placement. In the alternative, if viewing the grandparents' request for placement through the lens of section 388 was appropriate, P.S. argues that the juvenile court erred when it found that it was not in P.S.'s best interests to be placed with her grandparents. We agree that the juvenile court erred in failing to apply section 361.3's statutory factors when deciding the issue of placement and thus do not address P.S.'s alternative argument. Consequently, we reverse the juvenile court order denying the grandparents' section 388 petition. We necessarily reverse the juvenile court orders terminating parental rights and designating the foster parents, Jesse and JoAnna G., as P.S.'s prospective adoptive

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[1] All further statutory references are to the Welfare and Institutions Code.

parents. The matter is remanded to the juvenile court for a hearing on the grandparents' request for placement pursuant to section 361.3.

PREVIOUS APPEAL[2]

On April 1, 2015, the Los Angeles County Department of Children and Family Services (DCFS) filed a petition alleging that P.S., then less than one month old, fell under section 300, subdivision (b). Mother had a history of substance abuse, currently used methamphetamine, and had mental and emotional problems including depression and bipolar disorder, for which she failed to take her psychotropic medications. Father had a history of illicit drug use and currently used methamphetamine. Father also had a diagnosis of bipolar disorder and a criminal history including a conviction of voluntary manslaughter. These issues endangered the newborn's health and safety and put her at risk of harm.

On April 7, 2015, DCFS investigated the paternal grandfather as a possible placement, and he indicated he would be willing to care for P.S. when he returned from an out-of-state trip. On April 21, 2015, DCFS reported that the residents of the paternal grandparents' home had been live-scanned and had no criminal records, but no inspection had taken place. At a hearing that same date, father pleaded no contest to the petition. The juvenile court found the petition true, ordered no reunification services for father, ordered reunification services for mother, and

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[2] The following facts were set out in our previous opinion in this case—*In re P.S.* (Nov. 18, 2016, B269672) [nonpub. opn.].

placed P.S. in foster care, ordering DCFS to assess the paternal grandfather for possible placement.

On October 20, 2015, father filed a request to change a court order under section 388, requesting reunification services and unmonitored visits.[3] In the alternative, father asked "for placement of [P.S.] with the paternal grandparents as [DCFS] has still not assessed their home against court orders." The juvenile court granted father a contested hearing on the section 388 petition and ordered DCFS to assess the home of the paternal grandparents for placement. The juvenile court also terminated the parents' reunification services. The permanent plan was adoption by the foster family, with a section 366.26 hearing scheduled for February 2016.[4]

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[3] Under section 388, subdivision (a)(1), "[a]ny parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court." In order to grant a section 388 petition, the juvenile court must find by clear and convincing evidence that the proposed change is in the best interests of the child. (§ 388, subd. (a)(2).)

[4] When reunification efforts fail, the juvenile court will terminate reunification efforts and set the matter for a hearing under section 366.26 for the selection and implementation of a permanent plan. (*In re Celine R.* (2003) 31 Cal.4th 45, 52.) At that point, the focus becomes the best interests of the child, with the goal of protecting a child's right to a stable, permanent home in which the caretaker can make a full emotional commitment to the child. (*In re H.R.* (2012) 208 Cal.App.4th 751, 759.)

DCFS filed a last minute information, notifying the court that on October 27, 2015, the social worker requested an assessment of the paternal grandfather's home. On December 1, the social worker learned the home had been assessed and the physical home inspection and criminal background had been cleared. DCFS was awaiting approval by a supervisor before placing the child with the grandparents. A September 2015 progress letter stated that father had severe and persistent mental illness rendering him unable to care for the child or for himself. Father's housing did not permit children.

Father attended the December 9, 2015 hearing on his section 388 petition. The foster father testified that through the social worker, he had made his contact information available to the paternal grandparents, but they had never contacted him or tried to visit P.S. Father's counsel argued the court should grant the petition and give father a chance at reunification. Counsel argued that the paternal grandparents "do want placement. They clearly have shown their interest because they made their home available" for the inspection. The foster parents were doing a great job, but it could be in P.S.'s best interest to be placed with relatives so at least if father obtained reunification services, he could visit P.S. at the home of the paternal grandparents.

P.S.'s counsel asked that the juvenile court deny father's section 388 petition. P.S. had no relationship at all with the paternal grandparents, who had never visited, and should remain in her foster care placement. Mother's counsel agreed. Counsel for DCFS recommended denial of the section 388 petition regarding reunification services, and agreed with P.S.'s counsel that P.S. should not be removed from her placement: DCFS "was

assessing the home of the grandparents, but absent a court order did not intend to replace the child."

The juvenile court noted that P.S. was nine months old and had been in the same foster placement since detention. Father remained unable to care for P.S., and his living situation did not allow children. It was not in the best interest of P.S. to have family reunification services, or to be placed with the paternal grandparents, who had never visited or called to arrange visitation. The juvenile court denied the section 388 petition and ordered that P.S. remain in the foster care placement.

Father appealed but argued only one issue raised in his section 388 petition. He contended the juvenile court had abused its discretion in denying his section 388 request for placement with the paternal grandparents without an independent evaluation pursuant to section 361.3, rather than a general consideration of the best interests of the child. Father did not appeal the juvenile court's denial of his request for reunification services. DCFS chose not to respond given that the agency had already evaluated the placement, and the paternal grandparents' home inspection and criminal background check had cleared.

We dismissed the appeal. We considered the paternal grandparents' involvement in the case and noted: "Here, father requested that P.S. be placed with the paternal grandparents, but the paternal grandparents never made a request for placement (although the grandfather at the time of detention stated he was willing to care for P.S., and eventually the grandparents allowed the assessment). Section 361.3, subdivision (a), states 'preferential consideration shall be given *to a request by a relative of the child for placement of the child with the relative*.' (Italics added.) '[A] timely request for placement,

made in open court, is sufficient to trigger the investigation and evaluation required by section 361.3.' (*In re Rodger H.* (1991) 228 Cal.App.3d 1174, 1185.) The [paternal] grandparents made no such request and never sought to see P.S. during the nine months P.S. lived with the foster parents." We concluded that the paternal grandparents had "never requested placement, did not file a section 388 petition, and [were] not parties to this appeal." This was significant as the paternal grandparents were the only parties with standing to appeal. We thus dismissed father's appeal as he lacked standing.

SUBSEQUENT PROCEEDINGS

As noted above, the juvenile court originally set the section 366.26 hearing for February 2016. However, the juvenile court subsequently continued that hearing and ordered that DCFS provide a supplemental section 366.26 report regarding the foster parents, as well as information addressing the visits between P.S. and the paternal grandparents. On July 6, 2016, the juvenile court ordered that the paternal grandparents have two to three-hour visits, two to three times per week.

On July 12, 2016, the foster parents requested that they be named P.S.'s de facto parents. The foster parents said they had cared for P.S. since she was 23 days old, held educational rights on behalf of P.S., and took her to all her medical and therapy appointments.[5] The juvenile court granted a hearing on the foster parents' request.

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[5] Dr. Diane Cullinane was appointed by the juvenile court to conduct a developmental assessment of P.S. According to Dr. Cullinane, P.S. had partial fetal alcohol syndrome, meaning that

On August 31, 2016, the paternal grandfather filed a section 388 petition. The grandfather said that DCFS had recommended placement of P.S. with the paternal grandparents. The grandparents wanted to be appointed P.S.'s guardians and stated they were "willing and eligible" to care for P.S., and would be able to provide her with a stable environment and a rich family history. The juvenile court granted a hearing on the grandparents' petition.

On September 15, 2016, the paternal grandfather filed a section 388 petition requesting custody of P.S. According to the grandfather, DCFS had failed to place P.S. with the paternal grandparents when they originally requested custody back in March 2015, and father had requested that P.S. be placed in the paternal grandparents' home at that time as well.[6] The paternal

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it appeared P.S. had prenatal exposure to alcohol, which would contribute to growth and developmental difficulties. P.S. had some developmental delays and some behavioral challenges. However, some of those challenges might get better over time, and P.S. had already had made some improvement.

[6] The paternal grandfather submitted a letter with the petition stating that he and his wife had requested custody of P.S. in March 2015, immediately after learning about her removal from father. According to the paternal grandfather, DCFS had failed to return his phone calls or emails for months until a new social worker finally called them in November 2015. The paternal grandparents were enraged when they attended a juvenile court hearing in January 2016 and P.S.'s former counsel stated that the grandparents had only recently taken an interest in P.S. The paternal grandfather also submitted evidence that the grandparents' home had received "Approval of ASFA Caregiver Home" on November 17, 2015.

grandfather said that P.S. had family willing and able to care for her and "it is her right to be with her family and our right to care and provide for her."

On September 19, 2016, the juvenile court denied the foster parents' request for de facto parent status. The paternal grandfather said he was visiting P.S. once a week, rather than the allowed three times per week, because it was a 100-mile roundtrip drive for him, and that if P.S. were placed with him, it would be easier to fit her therapy appointments into their schedule. The foster father countered that any big shifts in P.S.'s routine might cause a relapse in her progress and development. The juvenile court denied the paternal grandparents' September 2016 section 388 petition, stating the best interest of P.S. would not be promoted by a proposed change of order due to her special needs and need for stability.[7]

On October 17, 2016, the juvenile court ordered DCFS to interview the foster parents about P.S.'s special needs and to prepare a supplemental report addressing the paternal grandparents' ability to meet those needs if granted further visitation. On October 24, 2016, the juvenile court ordered DCFS to keep the paternal grandfather advised of the date and time of

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[7] On October 6, 2016, the paternal grandfather filed an appeal in pro. per. Similar to the present appeal, the grandfather's opening brief argued that the juvenile court had failed to apply the statutory preference for placement of P.S. with relatives, and requested a remand for an appropriate inquiry whether the grandparents were denied preferred placement. We held that the grandfather had provided an inadequate record for review and thus affirmed the juvenile court's decision without reaching the merits of the claim. (See *In re P.S.* (Feb. 28, 2018, B279020) [nonpub. opn.].)

P.S.'s therapy, which he would be allowed to attend. The court directed DCFS to provide it with updates as to the grandfather's progress on, and knowledge and participation in, therapy. On November 21, 2016, the juvenile court ordered DCFS to prepare a supplemental report addressing why a permanent plan of legal guardianship was appropriate for P.S.

The court began the section 366.26 hearing on January 11, 2017. On January 18, the court appointed an expert to assess P.S.'s bond with her foster family, as well as the paternal grandparents, and to determine the likelihood of detriment should P.S. be placed with the grandparents. The expert was also to assess the extent of P.S.'s special needs, if any.

On May 10, 2017, P.S.'s new counsel stated that she had asked for, but still had not received, the DCFS social worker's case activity logs dating back to detention.[8] The juvenile court ordered DCFS to get all parties the case activity logs by the following week. The foster parents also filed another request for de facto parent status on that date. On May 16, 2017, the juvenile court denied the foster parents' request. P.S.'s counsel said she still had not received the case activity logs. She also asked the court to allow unmonitored and overnights visits for the paternal grandfather so he could visit P.S. more often. The juvenile court granted DCFS discretion to liberalize the grandfather's visits, but not before he had attended P.S.'s therapy and was aware of her issues.

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[8] Specifically, counsel asked for the "Title XX's." As noted in several unpublished cases, "Title XX's" refer to DCFS's case activity logs setting forth all contacts, services and visits. (See, e.g., *In re Marco W.* (Dec. 12, 2012, B238471) [nonpub. opn.].)

On June 23, 2017, the paternal grandfather filed a section 388 petition requesting custody of P.S. On June 26, the grandfather filed a declaration stating that he had been requesting custody of P.S. from the outset of dependency proceedings, but his requests and phone calls were ignored by social workers for months. On June 27, the juvenile court granted the paternal grandfather a hearing on his petition.

On July 17, 2017, the juvenile court granted the foster parents' request to be named de facto parents. However, the court noted that no efforts had been made to place P.S. with the paternal grandparents and that this was a violation of the law. The court ordered DCFS to report on what efforts it had made to place P.S. with relatives, and to address whether the foster parents and paternal grandparents had been able to attend P.S.'s therapy sessions.

On August 2, 2017, P.S.'s counsel placed the matter on calendar to address therapy because the foster parents had been unhappy with the grandparents attending therapy sessions. The juvenile court acknowledged that the foster parents had "made it clear they don't want to follow this court's order." The court stated that P.S. was going to have to learn how to adapt to the grandparents, and "if they had been in her life like the law required they be and [DCFS] had followed the law from the beginning, it would have already happened. It didn't happen because they didn't follow the law. And so that's what's going to happen now." The court ordered the foster parents and paternal grandparents to attend P.S.'s therapy sessions on an alternating schedule. The court also noted that if DCFS "had followed the law, we'd probably be in a different place right now. And . . . I have never seen a child come in here that can't adjust to change."

On August 18, the court appointed an expert to assess the nature and extent of any developmental issues that P.S. may have. On October 2, the court rejected the foster parents' request that P.S.'s overnight visits with the grandparents be suspended.

On October 31, 2017, the parties appeared before the juvenile court once again. Counsel for the paternal grandparents argued that the grandparents' section 388 petition was more akin to a section 361.3 motion.[9] Counsel for the foster parents

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[9] Under section 361.3, subdivision (a), "In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative . . . ." When determining if placement with a relative is appropriate, the juvenile court must consider, in relevant part, "[t]he best interest of the child, including special physical, psychological, educational, medical, or emotional needs"; "[t]he wishes of the parent, the relative, and child, if appropriate"; "[t]he good moral character of the relative and any other adult living in the home, including whether any individual residing in the home has a prior history of violent criminal acts or has been responsible for acts of child abuse or neglect"; "[t]he nature and duration of the relationship between the child and the relative, and the relative's desire to care for, and to provide legal permanency for, the child if reunification is unsuccessful"; "[t]he ability of the relative to . . . [¶] . . . [p]rovide a safe, secure, and stable environment for the child[,] [¶] . . . [e]xercise proper and effective care and control of the child[,] [¶] . . . [p]rovide a home and the necessities of life for the child[,] [¶] . . . [p]rotect the child from his or her parents[,] [¶] . . . [f]acilitate court-ordered reunification efforts with the parents[,] [¶] . . . [f]acilitate visitation with the child's other relatives[,] [¶] . . . [f]acilitate implementation of all elements of the case plan[, and] [¶] . . .

strongly disagreed with this contention, arguing that the Court of Appeal had "already decided that the grandparents did not request a 361.3 placement hearing during reunification." P.S.'s counsel countered that when she received the case activity logs on June 6, 2017, "it became apparent that [DCFS] had deliberately decided not to even evaluate the grandfather for placement. They didn't communicate with him. And those facts were not before the Court of Appeal previously." The juvenile court agreed with P.S.'s counsel that "the law was not followed" in this case, and this was why "the matter has become so complicated." Nevertheless, the juvenile court concluded, the grandparents' petition had been filed pursuant to section 388 and the court would be proceeding under that statute.

On November 14, 2017, after several months of hearings and testimony, the juvenile court denied the grandparents' section 388 petition, finding that it was not in P.S.'s best interest to be moved from the foster parents' home.[10] In so holding, the court said it was important that the grandparents still remain a part of P.S.'s life. The court found there was no question that there had been a change of circumstances and that the first prong of section 388 had been met; that DCFS had failed in its

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[p]rovide legal permanence for the child if reunification fails." (*Id.*, subd. (a)(1)-(7)(H)(i).)

[10] During this final proceeding, P.S.'s counsel urged the juvenile court to decide the case pursuant to *In re Isabella G.* (2016) 246 Cal.App.4th 708, a case that addressed relative placement preference under section 361.3, and to place P.S. with the grandparents. However, the court did not discuss *In re Isabella G.* in its subsequent ruling and instead decided the case pursuant to section 388.

obligation to follow the relative placement preference at the outset of the case, and that the grandparents had since visited with P.S. and participated in her therapy. According to the court, "had [DCFS] done what they should have done" early in this case, the relative preference rules would have been followed and P.S. would have been with her grandparents. But "it didn't happen and [DCFS] failed in their obligation at that time. No doubt about it. . . . [DCFS] didn't do what they should have done."

Indeed, the court continued, the difficult prong was the "best interest" component of the section 388 analysis. Here, there were "two loving, caring families," and P.S. had resided with the foster parents most of her life. P.S. was thriving in the care of the foster parents and, the court stated, "we don't know what would happen if" her placement were changed, even though P.S. had developed a loving relationship with her grandparents. The court found that given P.S.'s special needs, it would not be in the child's best interest to move her from the foster parents' home, although "it would be in her best interest to have her grandparents to be able to act as grandparents."

Pursuant to section 366.26, the juvenile court then concluded that P.S. was adoptable, identified adoption as the permanent plan, and terminated the parents' parental rights. The court identified the foster parents as the prospective adoptive parents.

CURRENT APPEAL

I. Overview

On November 14, 2017, the juvenile court terminated the parents' parental rights and identified the foster parents as P.S.'s

prospective adoptive parents. P.S. now appeals the juvenile court's order denying the paternal grandparents' section 388 petition requesting placement of P.S. with them. Counsel for P.S. maintains this is not the case we believed it to be during the last two years. According to P.S.'s counsel, although, in the prior appeal, the paternal grandparents were portrayed as uninterested in obtaining custody of their granddaughter, in fact, "[n]othing could be further from the truth." Therefore, counsel argues, the juvenile court erred when it failed to apply the relative placement preference under section 361.3 to the paternal grandparents' request for placement and instead analyzed their claim under section 388. In the alternative, P.S.'s counsel contends that if it was appropriate to view the paternal grandparents' request for placement through the lens of section 388, then the juvenile court erred when it found it was not in P.S.'s best interest to be placed with the paternal grandparents.

II. *In re Isabella G.*

In *In re Isabella G.*, the grandparents repeatedly sought placement of the child after she was placed in protective custody. However, their requests were ignored by the social services agency. (*In re Isabella G.*, *supra*, 246 Cal.App.4th at pp. 711-712.) After reunification services were terminated, the grandparents filed a section 388 petition seeking the child's placement with them. (*Id.* at p. 715.) At the hearing on the petition, the juvenile court declined to proceed under the relative placement preference set forth in section 361.3, given that reunification services had been terminated, and instead applied the caregiver adoption preference under section 366.26,

subdivision (k).[11] (*Id.* at p. 712.) The court then denied the grandparents' petition, concluding that the best interests of the child would be served by adoption by the nonrelative extended family member, to whom she had substantial emotional ties. (*Id.* at p. 717.) The appellate court reversed, holding "that when a relative requests placement of the child prior to the dispositional hearing, and the Agency does not timely complete a relative home assessment as required by law, the relative requesting placement is entitled to a hearing under section 361.3 without having to file a section 388 petition." (*Id.* at p. 712, fn. omitted; see also *In re R.T.* (2015) 232 Cal.App.4th 1284, 1300 [where relative invoked relative placement preference before dispositional hearing, and agency and court failed to apply it at disposition, court was required to consider preference upon relative's subsequent filing of a section 388 petition].)[12]

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[11] Under section 366.26, subdivision (k)(1), "the application of any person who, as a . . . foster parent, has cared for a dependent child for whom the court has approved a permanent plan for adoption . . . shall be given preference with respect to that child over all other applications for adoptive placement if the agency making the placement determines that the child has substantial emotional ties to the . . . foster parent and removal from the . . . foster parent would be seriously detrimental to the child's emotional well-being."

[12] In *In re R.T.*, the appellate court reversed the juvenile court's order terminating parental rights on the ground the court and the agency failed to apply the relative placement preference and consider the child's aunt and uncle for placement. (*In re R.T.*, *supra*, 232 Cal.App.4th at pp. 1293-1294, 1303.) After termination of reunification services, the aunt and uncle filed a section 388 petition, seeking to set aside the disposition order and modify placement on the ground they were denied preferential

Thus, under *In re Isabella G.*, the section 361.3 relative preference applies when making the initial placement decision *and* during the subsequent dependency period. (*In re Isabella G.*, *supra*, 246 Cal.App.4th at pp. 719-723; see *In re Joseph T.* (2008) 163 Cal.App.4th 787, 793; *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1032.) Specifically, *In re Isabella G.* held the relative preference rules govern even if the reunification period has ended and a new placement is not "necessary" (i.e., there would be no placement change considered except for a relative's placement request). (*In re Isabella G.*, *supra*, 246 Cal.App.4th at p. 723.) The *Isabella G.* court explained that "[i]deally, the statutory scheme contemplates the Agency has identified and approved the child's relatives for placement before the dispositional hearing," but the Legislature did not intend to limit to this time period the obligation to consider a relative's custody request. (*Id.* at p. 719.)

In re Isabella G. also recognized that despite the strong relative preference rules, a relative is not guaranteed custody and the focus must remain on the child's best interests. (See *In re Isabella G.*, *supra*, 246 Cal.App.4th at p. 723.) Accordingly, when a party brings a section 388 motion seeking to move a minor's custody to a relative's home after the disposition hearing or after

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consideration for placement. The juvenile court denied the section 388 petition. The appellate court reversed, holding that the juvenile court's failure to apply the relative placement preference under section 361.3 was prejudicial error. (*Id.* at pp. 1300-1301.) According to the appellate court, the relative placement preference could be considered postdisposition because the aunt had invoked the preference by filing her section 388 petition for modification of placement before the dispositional hearing. (*Id.* at p. 1300.)

a section 366.26 reference, the juvenile court must give preferential consideration to the request, but this consideration must include an assessment of the child's current circumstances and whether the new placement would be in the child's best interest. (*Ibid.*; see *In re Stephanie M.* (1994) 7 Cal.4th 295, 317-320, 322.)

III. Application

The grant or denial of a section 388 petition is reviewed for abuse of discretion. (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 71.) "[A] court abuses its discretion when it applies incorrect legal standards." (*In re Shannon M.* (2013) 221 Cal.App.4th 282, 289.) Here, the juvenile court applied the incorrect legal standard. Instead of determining whether placement with the grandparents would be in P.S.'s best interest under section 388, the court should have given preferential consideration to the grandparents' request for placement pursuant to section 361.3.[13] By refusing to do so, the juvenile court abused its discretion.

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[13] As noted above, section 361.3 gives preferential consideration to a relative request for placement, which means that the relative seeking placement shall be the first placement to be considered and investigated. (*Cesar V. v. Superior Court*, *supra*, 91 Cal.App.4th at p. 1032.) The statute's intent is "that relatives be assessed and considered favorably, subject to the juvenile court's consideration of the suitability of the relative's home and the best interests of the child." (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 320, italics omitted.) Thus, a juvenile court must still consider the best interest of the child under section 361.3 while taking into account several additional factors. (See § 361.3, subd. (a)(1)-(7)(H)(i).)

When a dependent child has been removed from his or her home, the Legislature expresses a clear preference for placement with a relative, if the home is appropriate and the placement is in the child's best interest. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 320.) The relative placement preference under section 361.3 applies throughout the reunification period. (*In re R.T.*, *supra*, 232 Cal.App.4th at p. 1300.) Section 361.3 also applies after the reunification period where the relative has made a timely request for placement during the reunification period and the child welfare agency has not met its statutory obligations to consider and investigate the relative seeking placement. (*In re Isabella G.*, *supra*, 246 Cal.App.4th at p. 723.)

Section 361.3 is triggered when a relative requests placement of a child. (*In re Isabella G.*, *supra*, 246 Cal.App.4th at p. 722.) Thus, a request to change a court order under section 388 is not required to trigger a relative placement evaluation. (*Ibid.*) If a relative does use a request to change a court order when seeking placement of a child, then the juvenile court should apply section 361.3's statutory factors when deciding the issue of placement, rather than "the generalized best interest showing required under section 388." (*Id.* at p. 722, fn. 11.)

In this case, the paternal grandfather filed a section 388 petition requesting custody of P.S. on June 23, 2017, after the reunification period. However, the grandfather also filed a declaration stating he had asked for custody of P.S. when dependency proceedings first began, but that his requests and phone calls had been ignored by social workers for months.[14]

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[14] On March 5, 2015, the grandfather spoke to social worker Rani Wesley and said that mother and P.S. could reside with him. P.S. was removed from mother and placed with the

Shortly thereafter, the juvenile court agreed that no efforts had been made to place P.S. with the grandparents, despite their continued requests, and found that the agency's failure violated the law. Indeed, the court repeatedly stated in subsequent hearings that DCFS had failed to follow the law in this respect. Given that the juvenile court explicitly credited the grandparents' claim that they had sought placement during the reunification period, the court should have proceeded under section 361.3.[15]

Furthermore, the juvenile court's error was not harmless. (See *In re Isabella G.*, *supra*, 246 Cal.App.4th at p. 724 [failure to

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foster parents on March 26, 2015. In April 2015, the grandparents underwent a live-scan for placement of P.S. On June 29, 2015, father told social worker Erica Carrillo that the grandfather was a retired police officer who wanted custody of P.S. and did not want her in foster care. Father said the juvenile court ordered grandfather's home to be assessed and he had live-scanned, but was never called for a home assessment. Father told the social worker "that paternal grandfather had informed previous CSW that he would not allow mother to visit with the child because she abuses drugs." By July 16, 2015, DCFS had already decided not to place P.S. with the grandfather as the social worker informed mother that "the only way child would be placed with him would be if mother did not reunify with child." The grandparents' home was inspected and on November 17, 2015 it was approved for placement.

[15] The foster parents' counsel told the juvenile court that the Court of Appeal had already determined the grandparents did not request a section 361.3 placement hearing during reunification. However, our finding was made without knowledge of DCFS's failure to meet its statutory obligations to consider and investigate the relative seeking placement. (See *In re Isabella G.*, *supra*, 246 Cal.App.4th at p. 723.)

apply relative placement preference was not harmless and had instead resulted in miscarriage of justice].) "When the proceedings take place under an inappropriate statute, even one requiring similar findings, the parties are not afforded the opportunity to tailor their case to the correct statute, and the trial court cannot fulfill its responsibility to make findings of fact within the provisions of that statute." (*In re V.F.* (2007) 157 Cal.App.4th 962, 973.) Thus, we must remand the matter to the juvenile court given that the court has not considered the facts within the appropriate statutory provision. (*Ibid.*) Our decision comports with the long-standing rule that the reviewing court is not the finder of fact. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) We express no opinion on the outcome of this matter upon remand.

DISPOSITION

We reverse the order denying the grandparents' section 388 petition. We necessarily reverse the orders terminating parental rights and designating the foster parents as P.S.'s prospective adoptive parents. The matter is remanded for a hearing on the grandparents' request for placement pursuant to section 361.3.

NOT TO BE PUBLISHED

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.